

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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* * * * *		* Hon. Denny Chin, USDJ
		Hon. Douglas F. Eaton , USMJ
BIOSAFE-ONE, INC. d/b/a		*
www.biosafeone.com and		Civ. No. 07-6764 (DC)(DFE)
CHRIS JORGENSEN,		*
	Plaintiffs	
		*
-against-		
		*
ROBERT HAWKS, BRAD SKIERKOWSKI;		
NEWTECHBIO, USA a/k/a Brad & Company,	*	
Inc. d/b/a www.newtechbio.com;		
WWW.JUMBOMORTGAGES101.COM a/k/a	*	
jumbomortgages.net, and BCI FUNDING		
GROUP,	*	
	Defendants	
* * * * *		*

**DECLARATION OF ROBERT HAWKS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION
AND IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR A PRELIMINARY INJUNCTION
AND ORDER TO REACTIVATE WEBSITE**

STATE OF PENNSYLVANIA }
COUNTY OF LUZERNE } ss:

Pursuant to Title 28, Section 1746 of the United States
Code, I, Robert Hawks, declare under penalty of perjury that
the following statements are true and correct:

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and in Support of Defendants' Cross-motion
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1. I am a defendant in the above-captioned action and make this declaration on my personal knowledge and on my examination of Internet websites and other documents.

2. I have more than five years experience in website design and Internet marketing.

3. I have read the accompanying Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Cross-motion For a Preliminary Injunction. The facts recited therein are true and correct to the best of my knowledge, information and belief.

4. The exhibits referenced in said Memorandum of Law are true and accurate copies of the original documents or website pages.

5. The annotations to the exhibits referenced in said Memorandum of Law were made by me, are shaded or highlighted in green on color copies, and are true and correct to the best of my knowledge, information and belief.

6. The defendants in this action are Bradley Skierkowski and myself, and Brad & Company, Inc., a Pennsylvania corporation of which Skierkowski is the sole shareholder. All other

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"defendants" are either websites or trade names used by Skierkowski and/or me.¹

Overview

7. Skierkowski and I were in the mortgage brokerage business at all relevant times. We processed a loan for plaintiff Jorgensen and I had many telephone communications with him and his wife from mid 2004 through about the end of 2005. More than a year later, in April 2007 Skierkowski and I went into the same business as the plaintiffs, namely the Internet sale of septic system chemicals.

8. The method by which I created the www.newtechbio.com website for our septic system chemicals sales resulted in copying of some nondistinctive text material from plaintiffs' website. As soon as defendants were served with plaintiffs' initial papers in this action, I altered the website to eliminate the material objected to by plaintiffs. This was done at least a few days before August 21, 2007.

9. Thereafter plaintiffs caused our website to be shut down by sending the hosting company a Digital Millennium Copyright Act notice misrepresenting that this website in-

¹For convenience of reference the term "defendants" will be used to refer to Skierkowski and me unless otherwise stated.

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fringed plaintiffs' copyright. At the time the notice was sent there was nothing on our website that was a copy of anything on the plaintiffs' www.biosafeone.com website.

10. We then moved our website to a new domain name, cloggeddrainfield.com² with a new hosting company, Godaddy.com, and plaintiffs immediately caused that website to also be shut down by having their attorney send its hosting company another DMCA notice, again misrepresenting that the website infringed plaintiffs' copyright.

11. The Add2Net, Inc. d/b/a Lunarpages hosting company shut down www.newtechbio.com on August 23, 2007 and the Godaddy.com hosting company shut down www.cloggeddrainfield.com on August 27, 2007.

No Unauthorized Use of Plaintiffs' Confidential Information by Defendants

12. In order to qualify for his 2005 mortgage loan plaintiff Jorgensen submitted a mortgage application and bank statements, and authorized defendants to obtain his credit report. While those documents contained confidential information as to Jorgensen and his Biosafe-One business, they did not include a customer list or a vendor list.

²Persons accessing this website are now redirected to defendants' www.newtechbio.com website.

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13. Defendants have never obtained from any source a list of plaintiffs' customers or vendors. That have never initiated any communication to any person or entity known to them to be a customer or a vendor of plaintiffs.

Plaintiffs' Business

14. At all relevant times plaintiffs were in the business of selling septic system chemicals via their website www.biosafeone.com.

Industry Terms such as Sludge, Digest, Shock Treatment

Sludge Digester

15. The septic system chemicals sold by plaintiffs via their website (and those sold by defendants via their website) include chemicals containing bacteria for digesting septic system waste including sludge, which is a relatively dense form of such waste.

16. The term "sludge digester" occurs 23,700 times in an exact phrase search via www.google.com and is used on thousands of web pages pertaining to septic system bacterial related issues. A sludge digesting product termed "sludge digester" is sold on the website <http://ultraclear.com/ucsd.html>.

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Shock

17. The term "shock" is commonly used in the spa, pool and waste treatment industries to refer to a strong oxidizing agent. This term is defined, for example, on the website <http://www.thermospas.com/about/glossary.php#S> as:

A strong oxidizing agent that does not contain chlorine.
Shock is used to break down biological wastes, and aids
in the sanitization of the spa water.

18. A septic system treatment product "Septic Shock" is offered for sale on the website <http://www.septic-1.com/>. The terms "shock treatment", "shock dose" and "shock" appear on various websites. Examples are (underlining added):

www.septicseep.com/ - "Restoring Failed Drain Fields: In actual field experience, failed drain fields have been restored by applying Septic Seep in greater quantities. Good results have been obtained by applying 4 gallons directly to the drain field soil as a shock treatment."

<http://www.septicsystemhelp.com/septalguarantee.html>
- "SHOCK TREATMENT TO CORRECT PROBLEMS. If problems already exist with your system, use the "Fast shock treatment".

<http://www.arrowseptic.com/Hydro.html> - "Commercial strength enzyme shock treatment to attack any leftover residue that may remain".

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<http://www.septicare.com/Septic%20tank%20faq.php> -

"For severe problems, a shock treatment of 8 scoops of SEPTICARE may be necessary."

<http://www.citraclean.com/drain-a-way.html> - "In-

itial shock treatment by using 4 pouches into toilet and allow time for pouches to dissolve and then flush. Repeat if necessary."

<http://www.environmentalsolutions.net/septicsolutions.php> - "If severe problems exist, it is recommended that you increase the dosage, two-to-three times above the maintenance dosage. These amounts are considered "shock treatment levels ...".

http://www.arcan.com/board/message_view.tpl?sku=122

- "If we can get some flow restarted and then follow with a shock dose of professional bacteria to consume the excess bacteria, we may be able to restore the drainfield."

<http://www.shac.ca/faqs/ShactivateFAQ.htm> - "For a system with pre-existing field drainage problems, shock the system with a 10L application to the septic tank (grey water side) prior to applying the first 1L maintenance dose down the toilet."

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<http://kaiser-battistone.com/kb-x-tendr/-kb-x-tendr.shtml> - "Older, overtaxed or neglected septic systems and cesspools that have not been properly maintained (cleaned at least every two years,) may require a "shock dosage" to create a high bacterial level."

Establishment of Defendants' Website; Unintended Copying

19. Early in 2007 defendants' mortgage brokerage business declined significantly due to what has been termed the subprime mortgage crisis. By the end of the first quarter our business was down to an insignificant amount and we decided to seek another source of income by going into the sale of septic system chemicals - the same business plaintiffs were and are engaged in. Defendants' website www.newtechbio.com became operational in April 2007, nearly 18 months after my communications with Jorgensen had ended.

20. To create defendants' website, I compiled substantial amounts of information from the websites of over 20 online companies (including plaintiffs' www.biosafeone.com website) selling septic system chemicals, and stored the collected data in text or Microsoft Word format; and used this aggregation of stored material as a reference to help with the planning and creation of defendants' website. In doing so I extensively

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edited and rearranged selected portions of the collected material.

21. An unintended result of this method of website creation was that some nondistinctive material from plaintiffs' website was copied into defendants' website. At no time did Skierkowski or I intentionally attempt to replicate any portion of plaintiffs' website.

Look and Feel of Websites

22. The look and feel of the plaintiffs' and defendants websites was always, and still is, completely different.

23. I have compared, in detail, each page of plaintiffs' www.biosafeone.com website with defendants' www.newtechbio.com current website. The two websites have a completely different appearance with different colors, fonts and overall web page arrangement. While both websites have certain organizational elements such as "before and after" photos, septic system diagrams, frequently asked questions ("FAQs"), and a comparison chart, those elements are common to several other websites that offer septic system chemicals for sale, and the content and visual appearance of those elements on defendants' website is markedly different from the content and visual appearance of corresponding elements on plaintiffs' website.

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"Before and After" Photos

24. "Before and after" comparison photos appear on the first page of each website. Defendants' photos are not copies of plaintiffs' photos. Various competing websites also display such photos.

Septic System Diagrams

25. Defendants' septic system diagram is markedly different from plaintiffs' diagram. Such diagrams are frequently displayed on competing websites. In fact, the diagram on plaintiffs' website is a copy of that on the http://septic-tank-treatment.info/Home_Page.html website.

Frequently Asked Questions ("FAQ"s)

26. The use of a "frequently asked questions" section on a website is commonplace. A google.com search for the phrase "frequently asked questions" returned about 159 million hits. Plaintiffs were not the first to use such a section on a website selling septic system chemicals. See, for example, the <http://www.statewidesupply.com/questions.html> web page.

Comparison Chart

27. Plaintiffs' and defendants' comparison charts are very different in appearance and content. Comparison charts are commonly used in the online sale of septic chemicals.

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Plaintiffs' comparison chart is quite similar to that on B&A Products web page <http://www.baproducts.com/1flush.htm>, the website of which was online before that of plaintiffs.

Defendants Did Not Use Plaintiffs' Biosafe-One Name
as a Keyword to Direct Online Searches to Defendant's Website

28. Plaintiffs falsely accuse defendants of using paid keyword advertising containing plaintiffs' Biosafe-One name to mislead consumers into purchasing from defendant. Plaintiffs claim that these acts were committed by defendants while advertising on www.google.com, www.yahoo.com and www.live.com. However, defendants did not give any Biosafe-One or similar keyword to any online search engine provider, including those mentioned above. The fact that defendants' domain name www.New-techbio.com was coming up on www.yahoo.com when plaintiffs' name Biosafe-One was typed into the Yahoo search engine was due to the logic system employed by Yahoo, as explained in an e-mail memo from that company. Defendants have advised Yahoo to exclude plaintiffs' name from future search results for defendant's products.

Plaintiffs' Practice of Using Competitors' Names as Keyword for Search Engine Advertising

29. Plaintiffs have engaged and are engaging in the very practice of which they accuse defendants. For example:

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a. Plaintiffs paid for placement of the keyword phrase "septic helper 2000" to result in display of plaintiffs' website listing on www.google.com, www.yahoo.com, and www.live.com while the actual website selling the product is www.septichelper2000.com.

b. Plaintiffs paid for similar placement of the keyword mark "Rid-x" on www.live.com, so that plaintiffs were and are using the third party Rid-X trademark to attract customers.

c. Plaintiffs paid for similar placement of the keyword mark "Septic Seep" on www.yahoo.com while the actual website selling the product is www.septicseep.com.

d. Plaintiffs paid for placement of the keyword mark "Septic Remedy" on www.yahoo.com while the actual website selling the product is www.septicremedy.com.

e. Plaintiffs paid for placement of the keyword mark "Septic Remedy" on www.yahoo.com and www.live.com while the actual website selling the product is www.septicare.com.

f. Plaintiffs' metatags embedded in their website include the third party trademarks Rid-x, Rid x, Septic Helper and Septic Helper 2000.

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Defendants Did Not Copy Plaintiffs' Online Text Advertisements

30. Plaintiffs accuse defendants of using similar text advertisements on google.com to deceive consumers into purchasing from defendants while searching for plaintiffs' product. However, online advertising portals generally allow for three lines of text to describe a product or service, and it is common to see trigger or power words such as "Maximum", "Powerful", "Strongest", "Best", etc.

31. Most online septic treatment chemical advertisers use the same or similar wording on their keyword advertising.

Plaintiff's Purported Trademarks Have Not Been Publicly Recognized

32. An internet tool known as "overture search tool" keeps records of all keywords typed into the www.yahoo.com search engine over the course of the previous month. For example, the keyword Hawaii drew 395,000 hits or people typing "Hawaii" into a Yahoo search page. This keyword tool also shows variations of typed words and displays the results accordingly.

33. This tool showed that keywords "Biosafeone", "biosafeone.com", and "bio safe one" each drew no Yahoo search inquiries in a recent 30 day period. Plaintiffs' purported trademarks "heavy sludge digester", "light shock", "medium shock" and "heavy shock" also drew no hits, meaning no one

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searched for these terms on the internet in a recent 30 period.
Thus the number of people searching Yahoo online for the
plaintiffs or their product is zero or extremely minimal.

34. The www.google.com service known as trends.google.-
com also shows that throughout this year, no one has searched
for the plaintiffs' company name, product name or purported
trademarks.

Nothing Unusual about the Organization of Plaintiffs Website

35. Most online retailers, including those selling
septic system chemicals, use a similar or identical layout
which is standard throughout web design. This website design
was not pioneered by the plaintiffs and is found on many
websites. "Frequently Asked Questions", "About Us", "About the
Product", "Comparison", "Testimonials", "Order" and other
sections are contained within many marketing websites.

36. Many companies were selling septic system chemicals
online before the plaintiffs and use the same or similar
wording to describe their product. Plaintiffs did not pioneer
the septic chemicals business; they simply copied what others
were already doing online.

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Many Competing Vendors; Many With Prior Websites

37. There are many vendors selling the same or similar product as plaintiffs, on over forty (40) different websites. Some of these websites are <http://www.supercoproducts.com/Bio-Paks.htm> (since 2001); http://www.adbio.com/septic/septic-treatment_unit.htm (since 1993); <http://www.biconet.com/-treatment/Cess.html> since (1995); <http://www.chempace.com/-products/bacteria/bacteria.html> (since 1997); <http://www.eco--save.com/products-frame.html> (since 2000); http://www.arcan.-com/septic_scrub/what_does.html (since 1997); <http://www.-septictech.com/plop.html> (since 2000); <http://www.septicare.-com/Septic%20tank%20technical.php> (since 1997); and <http://www.bio-sure.com/septicsystems.html> (since 1997).

Defendants' Current www.newtechbio.com Website Does Not Contain any Material From Plaintiffs' www.biosafeone.com website and Does Not Contain any of Plaintiffs' Purported Trademarks

38. Defendants have removed from their www.newtechbio.-com website all material objected to by plaintiffs and have checked to make sure their website does not contain any material from plaintiffs' www.biosafeone.com website.

39. Plaintiffs' purported trademarks "Light Shock", "Medium Shock", "Heavy Shock", and "Heavy Sludge Digester" are not on defendants' current website.

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Descriptive Nature of Plaintiffs' Purported Common Law Trademarks

40. To my knowledge after some Internet research, none of plaintiffs' purported trademarks is registered in any state or in the United States Patent and Trademark Office.

41. The term "shock treatment" is used in the septic system industry to denote use of a strong oxidizing agent, and that term appears on many websites offering septic system chemicals for sale. Plaintiffs' purported trademarks "Light Shock", "Medium Shock" and "Heavy Shock" merely describe chemicals for providing relatively low intensity, moderate intensity or high intensity shock treatment and therefore describe this characteristic of the chemicals.

42. The term "sludge digester" describes a product or system that digests sludge. Thus plaintiffs' purported trademark "Heavy Sludge Digester" merely describes a chemical capable of digesting heavy sludge.

The Internet as the Channel of Trade of the Parties

43. The parties directly compete with each other, selling septic system chemicals via their Internet websites. Advertising is done by placing key words/phrases and short (usually three lines or less) advertisements with companies

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that operate Internet search engines used by the public; the most popular of those search engines being at www.google.com.

44. Consumers use search engines to type in key words such as "septic system", "septic chemicals" etc. and use their computer mouses to click on websites displayed as or with the search engine results. They rarely type in the name of a specific system chemicals supplier.

45. Thus consumers search for the product they want to buy rather than for a specific supplier.

Plaintiffs' Improper Notice to Defendants' Web Hosting Companies
In Violation of the Digital Millennium Copyright Act

46. Defendants were served with process August 8, 2007. Shortly thereafter they removed from their www.newtechbio.com website the material objected to by plaintiffs. Defendants' website was being hosted by Add2Net, Inc. d/b/a Lunarpages which is represented by Jeffrey A Cohen, Esq. of Chapman Glucksman & Dean.

47. After defendants' website was free of all material objected to by plaintiffs, on August 21, 2007 plaintiffs caused their attorney Odette J. Wilkens, Esq. to send hosting company Add2Net, Inc. d/b/a Lunarpages a Digital Millennium Copyright Act ("DMCA") notice which falsely stated that defendants'

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current website was infringing upon plaintiffs' copyright.
The hosting company immediately shut down defendants' website.

48. In response to the letter of defendants' counsel dated August 27, 2007, counsel for Add2Net, Inc. d/b/a Lunarpages sent defendant's counsel Lessler a letter dated August 28, 2007 stating that defendants' website would be restored only if defendants "secure an order from the court directing [Add2Net, Inc. d/b/a Lunarpages] to re-activate the site ...".

49. After Add2Net, Inc. d/b/a Lunarpages shut down defendants' website they transferred it, under the domain name cloggeddrainfield.com, to another hosting company, Godaddy.com. However, by letter dated August 26, 2007 plaintiffs' attorney Odette J. Wilkens, Esq. sent hosting company Godaddy.com a DMCA notice which falsely stated that defendants' current website was infringing upon plaintiffs' copyright. As a result Godaddy.com immediately shut down defendants' cloggeddrainfield.com website.

50. By e-mail memo dated August 27, 2007 defendants' attorney demanded that Ms. Wilkens either (1) point out exactly what significant text or graphics on the cloggeddrainfield.com website is a copy of what protected material on the Biosafe-One

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website or (2) withdraw the DMCA notice letter. While Ms. Wilkens acknowledged receipt of that memo, she has not responded to it.

51. Because of the false DMCA notices sent by plaintiffs' attorney, defendants have been compelled to switch to a hosting company outside the United States at significantly increased monthly cost, and have lost substantial sales and profits during the shutdown periods.

52. The www.newtechbio.com website is the primary source of support for both Skierkowski and me and our families. Our income from the mortgage brokerage business is presently insignificant.


53. Internet shopping for septic chemicals is not like a customer going to a brick and mortar store and comparing the packaging of two competing items. Rather, a septic chemicals customer types key words into a search engine and evaluates information on corresponding websites to make a purchase decision.

54. Defendants have not had access to plaintiffs' customer list or vendor list. They have not used plaintiffs' confidential bank statements, 2005 mortgage application or 2005 credit report or any other information supplied by plaintiffs

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for any purpose other than processing a mortgage application
for plaintiff Jorgensen.

Dated: September 7, 2007


Robert Hawks